

FLEXIBLE WORK ARRANGEMENTS

Introduction

Alternative working arrangements are being demanded by today's employees and explored by employers. While the 21st century worker has different needs and perspectives than the worker of the past, the 21st century employer, competing with others for a shrinking pool of skilled workers, has more incentive than ever to be responsive to employee demands. The fast-paced, global, competitive work environment and today's workers both require greater and greater flexibility in work arrangements.

Dr. Edward Montgomery, Chief Economist with the United States Department of Labor, testified at the first American Worker at a Crossroads Project hearing in October 1997 on change in the workplace:

The nature of our jobs is . . . changing. Since the late 1960s, we have also seen a slight increase in the proportion of jobs that are part-time. Temporary workers who telecommute doubled between 1990 and 1995. A recent Upjohn Institute study found that almost a quarter of all workers are now employed in arrangements other than as regular full-time employees. As the population ages, workers may want more work flexibility, but they will also need pension and health-care benefits that these new work arrangements have been less likely to provide.¹

Professor Thomas Malone, part of the Massachusetts Institute of Technology initiative called "Inventing the Organizations of the 21st Century," also testified at an American Worker Project hearing on his vision for the future workplace.² Because of the important presence of new technologies, Professor Malone believes our nation will be required to have a significant increase in the use of highly decentralized ways of organizing work, including temporary networks of very small companies and independent contractors.³

The Clinton Administration's 1993 Commission on the Future of Worker-Management Relations (popularly known as the Dunlop Commission), when tasked with the examination of new methods to enhance workplace productivity, "affirm[ed] the valuable role contingent⁴ arrangements can play in diversifying the forms of employment relationships available to meet the needs of American companies and workers."⁵

As the following information reflects, the American workplace is becoming more flexible. Yet, as discussed in the later portion of this chapter, innovative, flexible workplaces are unavailable to millions of Americans because of certain provisions of the Fair Labor Standards Act. The American Worker at a Crossroads Project would like to encourage family friendly, flexible workplaces that are available to *all* Americans.

The Flexible Workforce – What Is It?

According to the Department of Labor's Bureau of Labor Statistics, the flexible workforce includes indirect and alternative workers. The Bureau places these workers in four general categories: "independent contract," "on-call," "temporary," and "contract".⁶ Please note, however, that there are myriad other terms and combination of terms used in our society to describe the alternative workforce, including "contingent,"⁷ "telecommuting," "job sharing," "e-lancing," "leased," "seasonal," "consulting," "homeworking," "casual," and "personal supply service" employees.⁸ The American Worker at a Crossroads Project heard numerous complaints from citizens around the nation that this lack of unity in definition often causes compliance confusion and expense for employers and employees.

The Bureau of Labor Statistics only began surveying characteristics of alternative work employment arrangements in 1995 and has completed only two such surveys thus far: 1995 and 1997.⁹ To determine various employment categories, the Bureau applies these definitions:

Independent Contractors, including consultants and free-lance workers, are independent regardless of whether they are wage and salary workers or are self-employed.¹⁰

On-Call Workers are called into work only when they are needed.¹¹

Temporary Workers are paid by a temporary help agency.¹²

Workers Provided by Contract Firms work for a contract company. They usually work for only one customer and usually work at the customer's worksite.¹³

The Flexible Workforce – Who is It?

The American Worker at a Crossroads Project repeatedly heard at roundtables around the country and hearings in Washington, DC that a significant percentage of Americans workers are employed in flexible worker arrangements. This percentage continues to grow.

Today, of the 128.4 million working Americans, there are 12.6 million employees in the Department of Labor's definition of a flexible workforce market.¹⁴ Breakdown of this 12.6 million by the Bureau of Labor Statistics' most recently available data shows:

- 8.5 million independent contractors (6.6% of the working population),¹⁵
- 2 million on-call workers (1.6% of the working population),
- 1.3 million temporary workers (1.0% of the working population), and
- 800,000 contract workers (0.6% of the working population).¹⁶

The Flexible Workforce - Why?

This large percentage of employees in the flexible workforce is attributable to a variety of factors. A flexible workplace:

Accommodates Employee Preferences

Two-thirds of American workers in alternative arrangements *prefer* their arrangements to typical “traditional job” arrangements. A breakdown of the Bureau of Labor Statistics’ most recent data shows:

- 84% of workers in alternative work arrangements prefer their work arrangements over “traditional jobs,”
- 40% of on-call workers prefer their work arrangements over “traditional jobs,” and
- 34% of temporary help workers prefer their work arrangements over “traditional jobs.”¹⁷

This preference is supported by a variety of reasons, including the fact that flexible work permits employee autonomy. Flexible employment is an attractive option for many because it allows workers to better control the frequency and intensity of their labor market participation. For example, a worker in a flexible workplace may choose to work fifty hours one week and thirty hours the next, spending the extra time to meet family or other needs.

Flexible work provides the opportunity to enter the “Traditional” job market. Many workers see flexible working arrangements as an entree into the job market and a source of income in between traditional jobs. A February 1997 *Wall Street Journal* article, “The Expanding Role of Temps Offers Avenue to Good Jobs” recognizes the new opportunities that arise from a job in the alternative workforce. “For their part, the companies, knowing they’ve got a free trial period, are more willing to take a chance on someone who might not fit exactly their job profile.”¹⁸ The Dunlop Commission also noted this benefit: flexible arrangements “provide a mechanism for transition between jobs, affording employers and workers an opportunity to size each other up before deciding to enter a more stable employment relationship.”¹⁹

With flexible arrangements, workers can develop skills. Employees can become “portfolio workers,” who “increase the agility of firms by moving productively from one job to another, constantly improving and adjusting their skills through both formal and informal educational opportunities.”²⁰ In a 1995 National Association of Temporary and Staffing Services survey, 56 percent of former temporary workers “said they learned new skills while working as a temporary employee.”²¹ Jeff Joerres of Manpower, Inc. believes people have adapted to the non-traditional workforce. “They are increasingly interested in a specific project, rather than a specific company. They are interested in getting more skills and moving on to the next project.”²²

Flexible work arrangements also provide a source of income or supplemental income for many Americans. For those unable to find suitable regular employment, flexible work serves as a significant social function. Steven Hipple and Jay Stewart have also found that temporary workers with lower education levels actually earned more relative to traditional workers.²³

Addresses Employer Needs

With constantly changing production and consumer demands, today's industries need freedom that does not always fit into the typical "forty hour week" workplace law box. Certain business aspects are time sensitive, with production requiring intense work at specific stages of development and less at others. Flexible work arrangements also allow a company "not only to adjust more easily to consumers by expanding or contracting the size of its workforce, but to quickly alter the mix of skills of its workers."²⁴

Reacts To Protective Public Policy

Some suggest "the increase in flexible employment is the result . . . of public policy motivated partly by the desire to protect and promote permanent employment."²⁵ For example, the Clinton Administration's Dunlop Commission, after months of research and hearings, determined that "current tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations."²⁶

Evaluating the rationale behind Dunlop's determination, Dr. Dwight R. Lee, Professor of Economics and the Ramsey Chair of Private Enterprise at the University of Georgia, believes that, because of the "legislation and judicial decisions supported by labor unions in the name of protecting against the arbitrary and unjust dismissal of permanent employees," there has been an erosion of employment-at-will.²⁷ This erosion has resulted in a "less permanent employment and more flexible employment to which labor unions are generally hostile, and which they commonly refer to as "contingent employment."²⁸ With this flexible employment, companies can make decisions about their workforce without being faced with policies affecting their right to hire and fire employees as needed. Best expressed by participants at an American Worker Project roundtable: "The attitude of legislation is that businesses will take advantage of their employees. In most cases, however, businesses take care of its employees."

Responds To Uncontrollable Circumstances

The workforce is also affected by circumstances largely beyond the control of public policy.²⁹ For example, "global economic changes, technological improvements, and demographic considerations" create "spontaneous changes in economic conditions and opportunities."³⁰ With such changes, companies have to have flexible employees immediately on hand to meet the market responses instantly.³¹

The Flexible Workforce - How to Support It

Congress needs to take steps to support worker autonomy for all Americans, including those in the flexible workplace, by ensuring that laws meet the needs of all workers.

Make Flexible Workplace Available to All – Update the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA), originally passed in 1938, remains the primary source of federal wage and hour laws under the same basic structure designed before World War II.³² As such, it also provides one of the main sources of legal limitations on flexibility for America's workforce. The principal provisions of the FLSA set the minimum wage, maximum hours, overtime pay, equal pay, and child labor standards.

The FLSA distinguishes between exempt and non-exempt employees. The sum total of this regulatory structure is a minefield which employers attempting to create more efficient workplaces cross at their peril. So-called “exempt” employees, often referred to as “white collar employees,” include professionals, executives, administrators, and outside sales persons. These workers are the foundation on which the economy is growing - they account for nearly 40% of the workforce - and yet they are wholly irrelevant under the outdated FLSA structure. Non-exempt employees basically include all other employees, a total 60.5 percent of America's wage and salary workers.³³ The FLSA minimum wage and overtime provisions apply *only* to these non-exempt employees.

Under the FLSA, all non-exempt employees that work over forty hours per week must be paid overtime. Overtime pay, commonly referred to as “time-and-a-half,” is equal to one-and-one half times an employee's regular rate of pay for the hours worked in excess of the forty hours per week. While this provision helps prevent exploitation of workers, it also discourages flexible work schedule options for non-exempt employees. Employees do not have the option to take time off instead of overtime pay.

At numerous American Worker Project Roundtables, participants called for workplace law reform because the current “one size fits all” concept restricts flexibility for workers and employers. For example, at one site visit, a number of employees wanted the freedom to work forty-five hours one week and then thirty-five hours the following week, spending the extra half day at home with a sick child or volunteering a child's school. The company would like to offer the option of working a total eighty hours in a two-week period, in weekly arrangements that would meet employee needs. Yet the Fair Labor Standards Act requires the employer to pay for extra hours worked in excess of forty hours per week, effectively preventing a flexible workplace even if the employees request it.

Legislation introduced by Congressman Cass Ballenger during the 105th Congress would have extended the compensatory time, commonly referred to as “comp time,” option to private sector employers, while preserving fairness to employee and employer.³⁴ The 106th Congress should continue to consider this “comp time” legislation or seek regulatory flexibility that gives employees additional options to manage their time. Congress may also want to consider legislation to update the exempt and non-exempt “tests” and antiquated distinctions that influence the administration of the Fair Labor Standards Act.

Encourage Flexible “Worker Friendly” Benefits and Incentives

Legally mandated benefits, including social security, worker’s compensation, unemployment insurance, and Family and Medical Leave Act, are generally available to both “traditional” and “alternative” employees.³⁵ While employers are not required to provide *discretionary benefits* such as health insurance and pensions, many do.

Overall, traditional workers are more likely than those in alternative arrangements to have health insurance, although there is wide variation in alternative work arrangement coverage. In traditional work arrangements, 82.8% of employees have health care coverage, with employers providing 57.5% of this coverage.³⁶ The following percentages of alternative workers also have health care coverage:

- 72.7 % of independent contractors,³⁷
- 67.3% of on-call workers (19.6% provided by employer),
- 46.4% of temporary help workers (7.0% provided by employer), and
- 81.7% of workers provided by contract firms (50.2% provided by employer).³⁸

Overall, traditional workers are more likely than those in alternative arrangements to have employer-provided pensions plans, although there is wide variation in alternative work arrangement pension coverage. While 52.2% of traditional employees are eligible for employer-provided pension plans, 46.9% elect to participate in the plan. The following percentages of alternative workers are eligible for employer-provided pensions:

- 3.6% of independent contractors (2.3% participating in employer-provided pension plan),
- 27.0% of on call workers (19.2% participating in employer-provided pension plan)
- 10.4% of temporary help workers (3.7% participating in employer-provided pension plan), and
- 47.6% of workers provided by contract firms (46.9% participating in employer-provided pension plan).³⁹

In 1996, Congress passed the Health Insurance Portability and Accountability Act (also known as the Kassebaum-Kennedy Act) to begin to address the issue of health insurance portability.⁴⁰ Although the Kassebaum-Kennedy Act requires an employer to ensure that a new coverage plan is available to employees who change or lose their jobs, it does not actually allow individuals to select or own their own health policies.

Congress should focus on the necessity for having workplace and tax laws that meet the needs of the modern workplace where employees may change jobs a number of times during their working lives. Consideration should be given to certain kinds of tax relief, such as deductibility of health plan costs for workers who purchase their own health care coverage, that allow access to affordable benefits for all workers. These tax savings would permit workers to move freely from job to job without the all too common anxieties “coverage issues” present in today’s workforce. Carol D’Amico, a Senior Fellow with the Hudson Institute and co-author of *Workforce 2020: Work and Workers in the 21st Century* testified that she “envision[s] the time when employer provided health insurance is a thing of the past and health insurance will be as available and cost effective as car insurance for individuals.”⁴¹

Additionally, Congress may want to consider federal laws that are flexible and neutral in allowing benefits to be tied to *the employer or the employee*. Congress should also investigate the option of allowing employees to carry vested benefits from job to job for the duration of their career, and, at the same time, avoid imposing layers of federal regulations.

Incentives, such as tax breaks, may also be helpful in “promot[ing] a vigorous and efficient private sector job service that has become increasingly essential to American workers’ ability to find the right job at the right time in an increasingly complex and mobile work force.”⁴² For example, Congress may want to give careful consideration to expanding the Earned Income Tax Credit to those in the flexible workforce that currently do not benefit from the subsidy.⁴³

Consider New Ways of Thinking

To help America meet the needs of the next century, members of Congress should be pioneers and challenge themselves to find the opportunities of the future. Congress needs to consider new ways of thinking.

The American Worker at a Crossroads Project began this pioneering effort by having Dr. Thomas Malone, professor at the Massachusetts Institute of Technology, testify on his research into innovative, economically efficient, and flexible ways of working. His most recent efforts focus on answering the many questions that can arise with the new, flexible workplace. Some of his questions include:

- How will human needs be satisfied?
- How will workers find financial security?
- Who will provide employee healthcare and retirement?⁴⁴

Dr. Malone believes a possible option for the future workplace is the formulation and growth of workplace “industrial guilds.”⁴⁵ Similar to the Screen Actors Guild, industrial guilds would offer workers post-industrial-age “empowerment,” providing generous benefits and unemployment insurance to members by generating revenue from a percentage of members’ pay. The guilds could grow from “professional societies, unions, college alumni associations, temporary help agencies, religions, neighborhoods, regions, or even extended families.”⁴⁶

Findings and Recommendations

- Congress should pass legislation to add flexibility and update the exempt and non-exempt “tests” and antiquated distinctions that influence the administration of the FLSA Act.
- Congress should enact the “comp time” legislation now before Congress or seek regulatory flexibility that gives employees additional options to manage their time.
- Congress should ensure that laws are flexible and tax neutral in allowing benefits to be tied to either the employer or the employees.

¹ Edward B. Montgomery, Chief Economist, Department of Labor, *Congressional Testimony before the House Committee on Education and the Workforce, Subcommittee on Oversight and Investigations, American Worker at a Crossroads Project, Hearing on the Future of Work in America*, 105th Cong., 1st Sess. (1997).

² Thomas W. Malone, Professor, Massachusetts Institute of Technology, *Congressional Testimony before the House Committee on Education and the Workforce, Subcommittee on Oversight and Investigations, American Worker at a Crossroads Project, Hearing on the Future of Work in America*, 105th Cong., 1st Sess. (1997).

³ Id.

⁴ “Contingent work force -- a somewhat pejorative term often used in place of ‘flexible.’” Edward A. Lenz, *Flexible Employment: Positive Work Strategies for the 21st Century*, JOURNAL OF LABOR RESEARCH, Volume XVII, Number 4, Fall 1996, p. 555.

⁵ Commission on the Future of Worker-Management Relations, Report and Recommendations, 103RD Cong., 2nd Sess. 36 (1994).

⁶ *Contingent and Alternative Employment Arrangements*, February 1997, DEPARTMENT OF LABOR, Bureau of Labor Statistics. In February 1994, “[t]he President’s own report from the Council of Economic Advisors conceded that there is no standard definition” for contingent workforce. Scott F. Cooper, *The Expanding Use of the Contingent Workforce in the American Economy: New Opportunities and Dangers for Employers*, EMPLOYEE RELATIONS LAW JOURNAL, v. 20, no. 4, Spring 1995, p. 526.

⁷ “Contingent work force -- a somewhat pejorative term often used in place of ‘flexible.’” Edward A. Lenz, *Flexible Employment: Positive Work Strategies for the 21st Century*, JOURNAL OF LABOR RESEARCH, Volume XVII, Number 4, Fall 1996, p. 555.

⁸ Scott F. Cooper, p. 525.

⁹ *Contingent and Alternative Employment Arrangements*, February 1997, DEPARTMENT OF LABOR, Bureau of Labor Statistics.

¹⁰ Id.

¹¹ “Persons with regularly scheduled work which might include periods of being “on call” to perform work at unusual hours, such as medical residents, were not included in this category.” *Contingent and Alternative Employment Arrangements*, February 1997 Technical Note, DEPARTMENT OF LABOR, Bureau of Labor Statistics.

¹² “To the extent that permanent staff of temporary help agencies indicate that they are paid by their agencies, the estimate of the number of workers whose employment was mediated by temporary help agencies is overstated.”

Contingent and Alternative Employment Arrangements, February 1997 Technical Note, DEPARTMENT OF LABOR, Bureau of Labor Statistics.

¹³ *Contingent and Alternative Employment Arrangements*, February 1997 Technical Note, DEPARTMENT OF LABOR, Bureau of Labor Statistics. “The last two requirements were imposed to focus on workers whose employment appeared to be very closely tied to the firm for which they are performing the work, rather than include all workers employed by firms that provide services.”

¹⁴ *Contingent and Alternative Employment Arrangements*, February, 1997, DEPARTMENT OF LABOR, Bureau of Labor Statistics, March 7, 1997. “The data were collected as a supplement as a supplement to the Current Population Survey (CPS), a monthly sample survey of about 50,000 households conducted by the Bureau of the Census for BLS.” *Contingent and Alternative Employment Arrangements, February 1997*, DEPARTMENT OF LABOR, Bureau of Labor Statistics, December 2, 1997. In September 1998, total employment was 131.8 million in the United States, after seasonal adjustment. *The Employment Situation: September 1998*, DEPARTMENT OF LABOR, Bureau of Labor Statistics, October 2, 1998. The breakdown of employees in alternative work arrangements based on this most recent employment statistic, however, has not been released as of time of printing. ¹⁵ “About 88 percent of independent contractors were identified as self-employed in the main [Current Population Survey] questionnaire, while 12 percent were identified as wage and salary workers. Conversely, about half of the self-employed were identified as independent contractors.” *Contingent and Alternative Employment Arrangements*, February 1997 Technical Note, DEPARTMENT OF LABOR, Bureau of Labor Statistics.

¹⁶ *Contingent and Alternative Employment Arrangements, February 1997*, DEPARTMENT OF LABOR, Bureau of Labor Statistics, December 2, 1997.

¹⁷ *Contingent and Alternative Employment Arrangements*, February 1997 Technical Note, DEPARTMENT OF LABOR, Bureau of Labor Statistics. These statistics do not include data for workers in contract firms. Contract employees are assigned to one customer at a time and perform the work at the customer’s worksite.

¹⁸ Hal Lancaster, *The Expanding Role of Temps Offers Avenue to Good Jobs*, THE WALL STREET JOURNAL, February 18, 1997, p. B1.

¹⁹ Commission on the Future of Worker-Management Relations, Report and Recommendations 103RD Cong. 2ND Sess. 35 (1994).

²⁰ Dwight R. Lee. *Why is Flexible Employment Increasing?* JOURNAL OF LABOR RESEARCH 17 (Fall 1996): 545.

²¹ Edward A. Lenz, p. 558.

²² Vincent J. Schodolski, p. 44.

²³ Steven Hipple and Jay Stewart, *Earnings and Benefits of Workers in Alternative Work Arrangements*, MONTHLY LABOR REVIEW, Volume 119, Number 10, October 1996, p. 46.

²⁴ Dwight R. Lee. *Why is Flexible Employment Increasing?* JOURNAL OF LABOR RESEARCH, 17 (Fall 1996): 544.

²⁵ Id.

²⁶ Commission on the Future of Worker-Management Relations, *Report and Recommendations* (December 1994) 35. Although some believe a flexible labor force is utilized to decrease employee cost, it should also be noted that with a flexible workforce, “labor cost is not always lower, when labor cost includes not only wages and benefits but also other fixed costs, such as training, and productivity.” Stanley D. Nollen, *Negative Aspects of Temporary Employment*, JOURNAL OF LABOR RESEARCH, Volume XVII, Number 4, Fall 1996, p. 581.

²⁷ Dwight R. Lee. p. 544.

²⁸ Id.

²⁹ Id. p. 542

³⁰ Id.

³¹ Id.

³² 29 U.S.C. §201 *et. seq.*

³³ 29 U.S.C. §219; *Minimum Wage and Overtime Hours Under the Fair Labor Standards Act*, U.S. Department of Labor, 1998 Report to the Congress, June 1998, p. 14.

³⁴ H.R. 1, 105th Cong. (1997).

³⁵ “[T]hese federal laws do not apply to anyone other than ‘employees.’ Thus, the independent contractor or consultant who is genuinely self-employed is not protected by any of these federal laws.” Maria O’Brien Hylton, *Legal and Policy Implications of the Flexible Employment Relationship.*, JOURNAL OF LABOR RESEARCH, Volume XVII, Number 4, Fall 1996, p. 589-90.

³⁶ *Contingent and Alternative Employment Arrangements*.

³⁷ Self-employed independent contractors must provide their own health care insurance.

³⁸ *Contingent and Alternative Employment Arrangements*; It is also important to remember that under the current system, employees may have access to health benefits from other sources, including spouses and parents.

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⁴⁰ Public Law No: 104-191.

⁴¹ Carol D'Amico, Senior Fellow, Hudson Institute, *Congressional Testimony before the House Committee on Education and the Workforce, Subcommittee on Oversight and Investigations, American Worker at a Crossroads Project, Hearing on the Future of Work in America*, 105TH Cong. 1ST Sess. (1997).

⁴² Edward A. Lenz, p. 564.

⁴³ Max. R. Lyons, *Part-time Work: Not a Problem Requiring a Solution*, EMPLOYEE POLICY FOUNDATION, 1997, p. 67.

⁴⁴ Thomas W. Malone, Professor, Massachusetts Institute of Technology, *Congressional Testimony before the House Committee on Education and the Workforce, Subcommittee on Oversight and Investigations, American Worker at a Crossroads Project, Hearing on the Future of Work in America*, 105TH Cong. 1ST Sess. (1997).

⁴⁵ *Id.*

⁴⁶ *Id.*